THOMPSON & KNIGHT LLP

ATTORNEYS AND COUNSELORS

1900 SAN JACINTO CENTER 98 SAN JACINTO BOULEVARD AUSTIN, TEXAS 78701-4238 (512) 469-6100 FAX (512) 469-6180 WWW.TKLAW.COM AUSTIN DALLAS FORT WORTH HOUSTON NEW YORK

ALGIERS MEXICO CITY MONTERREY PARIS RIO DE JANEIRO

July 7, 2005

Via Electronic Mail and Federal Express

Judge Ben Harrison Administrative Hearing Officer, MC 6RC-D United States Environmental Protection Agency, Region 6 1445 Ross Avenue, Suite 1200 Dallas, Texas 75202-2733

Re: Submission of The Dow Chemical Company, Chromalloy American Corporation and LDL Coastal Limited, L.P. regarding the Conference to Discuss the Unilateral Administrative Order concerning the Gulfco Marine Maintenance Site, CERCLA Docket No. 06-05-05

Dear Judge Harrison:

As you are aware from our meeting on June 30, 2005, regarding the Unilateral Administrative Order ("UAO") issued for the Gulfco Marine Maintenance Site (the "Site"), we represent The Dow Chemical Company ("Dow"). This letter is submitted on behalf of Dow, Chromalloy American Corporation and LDL Coastal Limited, L.P. ("Gulfco Parties"). As stressed at the meeting, the Gulfco Parties have not abandoned their interest in returning the Site to the Texas Voluntary Cleanup Program ("VCP") for investigation and cleanup as requested by Governor Perry. The Gulfco Parties preserve all rights to pursue this approach, an avenue which would be foreclosed by the effectiveness of the UAO. If the Gulfco Parties are compelled to proceed under the terms of the UOA, the Gulfco Parties intend to advise the Environmental Protection Agency ("EPA") of their intent to comply with the UAO within the timeframe in the UAO.

You clarified at our meeting, and Assistant Regional Counsel Barbara Nann agreed, that the Gulfco Parties had until Friday, July 8, 2005, to submit in writing any challenges or arguments raised in the meeting. As directed, the Gulfco Parties present, and submit as part of the Administrative Record, the following challenges to particular determinations and arguments supporting their interpretation of particular UAO provisions. Section I. of this letter presents the Gulfco Parties' challenges to particular determinations and their arguments supporting their interpretation of certain provisions. Section II. reviews some, but not all, of the agreements reached with EPA concerning the interpretation of certain provisions. Because you are preparing detailed notes of the meeting which will document all issues discussed, the Gulfco Parties review

40000

AUSTIN 219011.2

in Section II. only those provisions they deem most substantive. Section III lists the provisions that EPA asked for time to review and respond and lists the documents and other information that EPA agreed to provide to the Gulfco Parties. The Gulfco Parties request that this letter and its attachments be made a part of the Administrative Record for the Remedial Investigation and Feasibility Study ("RI/FS") for the Site under the UAO.

SECTION I.—CHALLENGES TO DETERMINATIONS AND ARGUMENTS SUPPORTING INTERPRETATION OF PROVISIONS

Community Relations

UAO Paragraph 80 and attached Statement of Work ("SOW") Paragraphs 31-33

As Dow emphasized in the meeting, active involvement in community relations is an important, over-arching priority for the Gulfco Parties. Due to Dow's presence in the local community and its trained and expert community resources, the Gulfco Parties are in an excellent position to take, and want to take, a proactive, leadership role in all community relations activities. The Gulfco Parties are willing to prepare drafts of all community relations documents, including Fact Sheets, press releases, public meeting information, and a Community Relations Plan, for EPA review and approval. The parties also desire to take an active, leadership role in all public meetings, community interviews and in meetings with individual stakeholders. Already, the parties have almost completed compilation of a stakeholders list and have prepared a preliminary internal draft Community Relations Plan based on a model provided by EPA. At the very minimum, the Gulfco Parties request the right to review and comment on all public communications before they are issued and to be present in all public meetings, community interviews and meetings with individual stakeholders. The preparation of draft community outreach materials and review of EPA drafts by potentially responsible parties are commonly allowed at Superfund sites.

In response to the Gulfco Parties' request, Ms. Nann stated that she would check with her management about the parties' involvement in community relations activities.

UAO Section V. Conclusions of Law and Determinations

UAO Paragraph 38

The Gulfco Parties dispute the first sentence of the determination in UAO Paragraph 38. The UAO recites that EPA gave Respondents an opportunity to enter into an Administrative Order on Consent ("AOC") under appropriate state authority covering the entire cleanup of the Site. Over the last four months, the Gulfco Parties have attempted to negotiate an AOC with EPA to return the Site to the State VCP for investigation and cleanup as requested by Governor Perry and directed by the Regional Administrator, Mayor Greene. The State VCP is an appropriate investigation and cleanup vehicle due to the circumstances of the Site's referral to the Superfund program and the liability protection the VCP will afford a future purchaser of the

Site. EPA staff, however, issued the UAO, without prior notice to the Gulfco Parties, which effectively terminated the AOC discussions. For example in March, the Gulfco Parties, at the Regional Administrator's direction, prepared and submitted a detailed outline of the terms of an AOC that provided for the return of the Site to the VCP. EPA staff declined to comment on this outline and instead stated that they would prepare a draft AOC for review and negotiation. Despite the Gulfco Parties' repeated requests over the last three and a half months, EPA withheld a draft of the AOC until June 17, 2005, less than a month before the UAO's effective date on July 15, 2005. The draft AOC finally provided made no mention of the VCP, and was basically EPA's model RI/FS order. This action, along with others¹ over the last four months, has convinced the Gulfco Parties that EPA staff has no intention of giving them the opportunity to investigate and cleanup the Site under the State's VCP oversight. Thus, the recital in Paragraph 38 is simply incorrect.

Record of Decision

UAO Paragraph 62 and SOW Paragraph 5

While the UAO forecloses the Gulfco Parties' opportunity to investigate the Site under the VCP, the parties will have another opportunity to achieve the goal of a more marketable property using the VCP at the remedy selection and completion phase. Because the UAO does not encompass the remedy phase at the Site, the selection and completion of the remedy remains a separate step in the process. The Gulfco Parties ask that EPA work with them and the State to insure that, following the Site investigation, the Site is referred back to the State for selection and performance of the remedy under the VCP. A possible avenue to achieve this "win-win" objective is for EPA to conclude in the Record of Decision that the Site is to be returned to the VCP for remedy selection and completion. Should the Gulfco Parties proceed under the UAO, they want to preserve the means to work with EPA to return the Site to the State VCP for remedy selection and completion. The VCP with its liability protection for future purchasers is an important means to achieving a marketable property.

Step-Wise, Iterative Process of Site Investigation

UAO Section XVIII. Sampling, Access and Data Availability/Admissibility-Paragraph 72 and SOW Paragraphs 22, 27a., 34, 35, 36a.(vii) and 37d.

The UAO is specific in its step-wise, interactive approach to the technical investigation of the Site. Throughout its provisions, the UAO describes an iterative program which builds on existing data to decide the necessity for subsequent investigative steps. The UAO in Paragraph 27a. of the SOW provides:

The human health and ecological risk assessments require that the sampling be conducted to demonstrate that the data are statistically representative of the Site.

¹ A detailed description of the actions is set out in the Gulfco Parties' July 1, 2005 letter to the Regional Administrator which is attached hereto and made a part hereof.

...The FSP (Field Sampling Plan) shall consider the use of all existing data and shall justify the need for additional data whenever existing data will meet the same objective....

Statement of Work Paragraph 22 requires the Respondents to develop a Preliminary Conceptual Site Model that will be used to identify data needs that will be targeted during the RI/FS. Paragraph 34 directs the Respondents to identify the sources of contamination, Paragraph 35 notes that activities are often iterative, Paragraph 36 a.(vii) requires an iterative sampling and monitoring program and Paragraph 37d. sets out an eight-step Ecological Risk Assessment process one goal of which is to eliminate those contaminants and exposure pathways that pose negligible risks (see Paragraph 37d.(ii) on page19 of 32).

The step-wise, focused technical approach required in the UAO is entirely consistent with the Superfund program and EPA guidance, including the TRIAD approach. In our meeting on June 30, we pointed out that the scope of investigation EPA insisted upon during the AOC discussions was a major impediment to the AOC negotiations. A step-wise approach to the Site investigation was what the Gulfco Parties had been proposing in their scopes of work for the AOC negotiations, but to no avail. During these AOC negotiations, EPA staff acknowledged that their investigation scope was based on a "worst case" scenario because EPA believed it would get only one opportunity to insure the adequacy of the investigation under the VCP approach. Under the UAO, however, EPA will have direct oversight of the Site investigation. In fact in our June 30 meeting, Mr. Miller, the Remedial Project Manger, agreed and admitted that the step-wise, iterative approach required in the UAO is a different approach than the VCP/AOC approach, and agreed that the investigation should proceed in a step-wise manner with further investigation necessary only when indicated by data gathered. Mr. Miller commented that the TRIAD's iterative approach, in which future actions are based on existing data, is an "excellent" and "preferred" approach. While the Gulfco Parties will not agree to undertake investigative steps not supported by data, the Gulfco Parties are committed to following the step-wise approach dictated by the UAO, including the above-cited provisions of the SOW, and will perform contingent activities when supported by the data collected.

With the iterative, data-supported technical approach set out in the UAO as the Gulfco Parties' guiding principle, the Gulfco Parties ask, as we did in our meeting, EPA to amend the off-site access provisions in Paragraph 72 of the UAO. The thirty-day timeframe for attempting to obtain off-site access is inconsistent with technical framework of the UAO. The Gulfco Parties ask EPA to amend the UAO to require the Respondents to obtain, or use their best efforts to obtain, off-site access within thirty (30) days after the need for such off-site access at a particular property has been determined by the data collected. Mr. Bolden stated that seemed reasonable. Ms. Nann said that she would discuss this issue with Mr. Miller and then this language could be clarified. EPA said it would advise the Gulfco Parties of how this paragraph will be amended.

UAO Section XI. Work to be Performed

UAO Paragraph 47

AUSTIN 219011.2

As stated at our meeting, if the Site is not returned to the State VCP and the Gulfco Parties are compelled to proceed under the UAO, it is the Gulfco Parties' intent to advise EPA of their intent to comply with the UAO and work cooperatively with EPA. The Gulfco Parties, however, want the Administrative Record to show that each of the Gulfco Parties reserves all rights to refrain from taking any action and to assert "sufficient cause" under CERCLA, at any time, if such party deems the requested action to be illegal or arbitrary.

SECTION II.— AGREEMENTS CONCERNING THE INTERPRETATION OF CERTAIN PROVISIONS

UAO Section III. Parties Bound

UAO Paragraph 4

EPA agreed that Respondents have fourteen (14) days from the date they retain a new contractor or subcontractor to provide a copy of the UAO to the new contractor or subcontractor. EPA also confirmed that Respondents are required to give the copy of the UAO only to someone in the contractor's or subcontractor's firm, and not to every individual working for the contractor or subcontractor.

UAO Section X. Notice of Intent to Comply, Paragraph 42, and UAO Section XV. Project Coordinators, Other Personnel, Paragraph 65

These two paragraphs conflict in that Paragraph 65 requires Respondents to name a Project Coordinator before the date they are required by Paragraph 42 to notify EPA of whether they intent to comply with the UAO. EPA agreed to amend the UAO to make it clear that Respondents can name their Project Coordinator at the same time they notify EPA of whether they intend to comply with the UAO as required by Paragraph 42.

UAO Section XI. Work to be Performed

UAO Paragraph 42

Mr. Miller agreed that any subcontractor can work under the hiring contractor's Quality Management Plan ("QMP"), and does not have to submit an individual QMP to EPA.

UAO Section XVIII. Sampling, Access and Data Availability/Admissibility

Paragraphs 70 and 71

You clarified, and Mr. Miller agreed, that the Quality Assurance/Quality Control programs that geotechnical contractors meet and how these programs satisfy the requirements of this paragraph can be described in a separate section of the RI/FS Quality Assurance Project Plan.

UAO Section XXIII. Assurance of Ability to Complete Work

UAO Paragraphs 83 and 84

Ms. Nann agreed that only Dow and Sequa Corporation (on behalf of its subsidiary, Chromalloy American Corporation) have to provide the financial assurance required by Paragraph 83. With regard to the insurance requirements in Paragraph 84, Ms. Nann agreed that the submission to EPA of contractor and subcontractor insurance certificates will satisfy the certification requirements of this paragraph. Ms. Nann further confirmed the insurance requirements in Paragraph 84 apply only contractors and subcontractors working at the Site and do not apply to those working away from the Site, for example off-site laboratories. Also, any new contractor or subcontractor will have to provide insurance certificates to EPA seven (7) days prior to doing any work at the Site.

SOW Section V. Tasks to be Performed and Deliverables

SOW Paragraph 18

Mr. Miller acknowledged that circumstances may arise during performance of the RI/FS that require extensions to the submittal schedules provided in the UAO. A specific example discussed in the meeting was the possible need for more than 20 days from receipt of EPA comments on the Draft RI/FS Work Plan to submit the Final RI/FS Work Plan depending on the extent of the comments, the need for meetings or telephone discussions, or the possible informal exchange of revised sections of the document as part of the document finalization process. Mr. Miller indicated that in situations such as this, a written request for an extension to the submittal schedule should be submitted to him. This request should provide an explanation as to why the extension is needed and should propose a revised deliverable submittal date.

SECTION III.— INFORMATION AND DOCUMENTS TO BE PROVIDED BY EPA

- 1. Ms. Nann will discuss the Gulfco Parties' request that they take an active role in all community relations activities and she will provide EPA's response to the Gulfco Parties.
- 2. UAO Section XI. Work to be Performed, Paragraph 42—Ms. Nann will review the necessary language to amend this paragraph to clarify that Respondents have to provide the names, titles, and qualifications of only the firm of the contractors that will be used to carry out the work at the Site, and not of each individual person performing the work at the Site. She will also review the language changes necessary to clarify that, aside from changes in the Project Coordinator, Respondents do not have to notify EPA of changes or additions of individuals within a firm, but only if the firm of contractors used to carry out the work changes or a new firm is added. Ms. Nann will review these issues and respond to the Gulfco Parties.
- 3. Mr. Miller will advise the Gulfco Parties regarding when EPA intends to publish notice of the availability of the Administrative Record as required in 40 CFR 300.815(a).

- 4. Ms. Nann will advise the Gulfco Parties as to whether EPA will amend Paragraph 72 of the UAO to require the Respondents to obtain, or use their best efforts to obtain, off-site access within thirty (30) days after the need for such off-site access at a particular property has been determined by the data collected. Ms. Nann said that she would discuss this issue with Mr. Miller and then this language could be clarified. EPA will advise the Gulfco Parties of how this paragraph will be amended.
- 5. Ms. Nann will provide the Gulfco Parties with a copy of the notice of the UAO that was given to the State before the UAO was issued.
- 6. Ms. Nann will advise Dow of the status of the outstanding Freedom of Information Act requests, including the request for documents relating to Parker Drilling.
- 7. To assist the Gulfco Parties in their community relations activities, the Gulfco Parties requested all notes and other documents concerning Mr. Miller's and other EPA representatives' meetings and interviews with members of the public and prior public meetings. Mr. Miller and Ms. Nann said they would discuss the Gulfco Parties' request and provide a response.

The Gulfco Parties appreciate the opportunity to submit this statement of position and summary of understanding regarding the UAO. If you have any questions, or require any additional information, please contact me at 512-469-6147.

Respectfully submitted,

Elizabeth A. Webb

Thompson & Knight, L.L.P.

Counsel for The Dow Chemical Company

cc: (via Electronic Mail and Regular Mail)

Barbara Nann, US EPA Region 6
Gary Miller, US EPA Region 6
Sandi VanWormer, The Dow Chemical Company
Scott Magelssen, The Dow Chemical Company
Steve Kilpatrick, The Dow Chemical Company
Brent Murray, Sequa Corporation
F. William Mahley, Strasburger & Price
Allen B. Daniels, LDL Coastal Limited, L.P.



July 1, 2005

F. WILLIAM MAHLEY 713-951-5633 bill.mahley@strasburger.com

VIA FEDERAL EXPRESS & EMAIL

The Honorable Richard E. Greene Regional Administrator, Region 6 U.S. Environmental Protection Agency 1445 Ross Avenue, Suite 1200 Dallas, Texas 75202-2733

RE: Gulfco Marine Maintenance, Inc. (Gulfco) Site in Freeport, Texas

Dear Mayor Greene:

On behalf of The Dow Chemical Company, Sequa Corporation, and LDL Coastal ("Gulfco Parties"), thank you again for the flexibility displayed in your March decision to return the Gulfco Site to the Texas Voluntary Cleanup Program (VCP) as requested by Governor Perry. As we described in that meeting, the parties strongly believe that this innovative approach, if successful, would have resulted in a better product (a more marketable property) in a shorter period of time. This approach was sound from both a legal and policy perspective.

Unfortunately, we must now report that the return of the Gulfco Site to the Texas VCP does not appear probable for the investigation phase of the project, and the Gulfco Parties see no other choice but to focus on the execution of the Unilateral Administrative Order (UAO) issued by the Division Director. The effective date of the UAO is July 15, 2005. Unless you see another alternative, the Gulfco Parties intend to conduct the site investigation under the UAO, working cooperatively with EPA. We regret that the "win-win" solution you advanced in March has failed and with its failure both EPA and the parties have lost. There will be, however, one more opportunity to achieve at least one aspect of the goal we originally set—a more marketable property. While the investigation phase will be longer and more costly under the Superfund UAO. the selection and completion of a remedy remains a separate step in the process, as the UAO does not encompass the remedy phase. If you are unable to return the Gulfco Site to the Texas VCP at this time, we ask that you consider working with us and the state to ensure that, following the investigation phase, the site is referred to the TCEQ for selection and performance of the remedy under the VCP, as Governor Perry originally requested.

The remainder of this letter describes the reasons the effort at this stage was not successful. We believe this background is essential if the Agency is to succeed in similar initiatives in the future. Further, we recently received a letter from Mr. Coleman



The Honorable Richard E. Greene
Regional Administrator, Region 6
U.S. Environmental Protection Agency
July 1, 2005
Page 2

dated June 22. The letter contained a number of significant misstatements regarding the history of our negotiations. The record of these discussions should be recounted correctly for your understanding.

As explained in the March meeting, starting in late 2004, the parties recognized the uniqueness of this site and troubling questions concerning the state referral for NPL listing. Accordingly, the Gulfco Parties began working to get EPA to consider an innovative approach to the cleanup of the Gulfco site intended to promote its return to productive use in the shortest possible time. From November 2004 through February 2005, the Region rejected various ideas presented by the parties, including the possibility of sending this site back to the State of Texas. Prior to your involvement, your Division Director and his staff refused to discuss any alternatives to the lengthy and costly Superfund approach.

In early March, Governor Perry, recognizing the issues associated with the state referral, asked EPA and TCEQ to work together to return the site to the state for action under the VCP. A copy of the Governor's letter is attached for your convenience. In our meeting on March 7, you decided on an approach that would respond to Governor Perry's request and result in the site being cleaned up under the VCP. You made specific assignments to your staff and the Gulfco Parties in the meeting. Developments since our meeting have been disappointing and frustrating and have made return of the site to the state at this stage, improbable, if not impossible.

While the Gulfco Parties promptly prepared an outline of terms for an agreed order consistent with your directive, the Division Director took a different approach-- he issued a letter only four days following our meeting which was totally inconsistent with your decision. He even contended that the Gulfco Parties had acknowledged that the path you had chosen would not work. A copy of this March 11, 2005 letter is attached for your review. On March 24, 2005, the Division Director issued another letter that we believe misstated your position regarding the use of the VCP. A copy of this letter is also attached. Thus, March was wasted as we endeavored to get your staff to acknowledge your decision. Your staff has never responded to the outline of the agreed order we submitted at your direction.

Finally, on April 1 in a meeting with Larry Starfield, the staff seemed to agree to the path that both you and the Governor had asked us to follow – referral of the site to the state VCP. This too proved illusory. In that meeting, we agreed to work on two parallel tracks – a technical track involving the development of a statement of work and a legal track involving the development of the Administrative Order on Consent.



The Honorable Richard E. Greene Regional Administrator, Region 6 U.S. Environmental Protection Agency July 1, 2005 Page 3

STATEMENT OF WORK (SOW)

The Gulfco Parties took responsibility for the SOW, prepared the draft SOW and have been attempting in good faith to reach agreement on the technical terms. We have been disappointed by your staff's response to our efforts. We have been chastised for rocking the boat by first asking for the state transfer and for insisting on a risk based/step wise approach to assessment of the site based upon the data gathered during the investigation. The staff has rejected this sound, focused technical approach in favor of a "shotgun" approach. Rather than attempting to answer the question, does this site pose a risk, the staff insists on answering a very different question- are there any risks in the area. This approach, which is inconsistent with EPA's published guidance and turns 25 years of Superfund risk science on its head, will no doubt confound the real question of what should be done at this site. Science is not driving the work scope. Despite the Division Director's emphasis in our April 1 meeting that the SOW be statistically-based, technical staff insisted on a soil sampling program based on an arbitrary grid spacing and rejected a proposed program that calculated the number of samples needed from existing data (collected under EPA direction) in accordance with EPA statistical guidance. Similarly, despite the Division Director's request in the April 1 meeting that the groundwater investigation program consist of potential source area and Site perimeter-based sample locations, technical staff rejected our proposed step wise, perimeter-based program and requested an arbitrary grid-based program.

<u>ADMINISTRATIVE ORDER ON CONSENT (AOC)</u>

On April 1 we again volunteered to prepare a draft AOC. Your staff rejected the offer and took responsibility for this task. Again, we called their attention to the outline we had submitted by March 11. Your staff then disregarded our agreement to work on a parallel track with us to develop both the SOW and the AOC. Finally, on June 17, three months after our meeting with you and delivery of our outline, we received a draft AOC. Unfortunately, it was wholly inconsistent with the approach you directed. The draft failed to address any of the issues relating to the referral of the site to the VCP. Earlier we had been told that the staff didn't want to waste their time on the AOC. While failing to spend time on an AOC, your staff found time to prepare and issue a Unilateral Administrative Order (UAO) which would return the site to the lengthy and expensive Superfund Process – the process your Division Director has pushed for all along. This UAO was issued May 23, 2005. We learned of its issuance on June 6 while we were preparing to meet in what we thought were ongoing good faith negotiations on the SOW.

529320.1/SPH/73364/0238/070105



The Honorable Richard E. Greene Regional Administrator, Region 6 U.S. Environmental Protection Agency July 1, 2005 Page 4

While your Division Director assured us that the UAO was simply intended to set a firm deadline and was not intended to affect ongoing negotiations on the SOW and use of the VCP, your staff disavowed this strategy, and stated categorically that technical issues would only be discussed in the context of the UAO and RI/FS under Superfund, and not in the context of a possible referral to the VCP. Issuance of the UAO effectively terminated the negotiations. This was confirmed in a recent conference call when your Division Director repeatedly refused to respond to requests for a commitment to meaningful negotiations. Instead he returned to his position that EPA would not talk about referring the site to the VCP. From their actions since March, it is clear to us that your staff clearly believes that the innovative approach that Governor Perry requested and you directed is not to be pursued. The Gulfco Parties are left to wonder how to communicate with an agency pursuing conflicting agendas.

From our perspective, this entire effort has been an enormous waste of time and money designed to provide the appearance of working toward the Governor's request while all the time intending to carry out the original enforcement first approach. The actions taken by staff are also entirely inconsistent with your "300 Day Plan", which promotes the following principles of "a better way": Reward results, not programs; Collaboration, not polarization; Lead with science and technology; Solutions transcend political boundaries; Science for facts, process for priorities; Consider benefits and costs; Make land available for reuse at contaminated sites; Protect America with innovative approaches to environmental problem solving; and Champion common-sense approaches and emerging technologies to solve environmental challenges, to name a few.

Unless you see another opportunity to revive a constructive dialogue, we believe the most expedient approach at this point is to simply accede to Mr. Coleman's unilateral order and conduct the investigation pursuant to that order. While not in line with your decision or the Governor's request, we see no other options.

In closing, we repeat our regret that the "win-win" solution you advanced in March has failed. The Gulfco group will work cooperatively with EPA to execute the EPA Unilateral Order. If you see a way to resolve the current impasse, please let us know immediately. We are, of course, available to meet with you and Mr. Starfield to discuss the reasons this effort failed and any prospect for salvaging the initiative that you can identify. Finally, we urge the Region to consider working with us and the state to ensure that, following the investigation phase, the site is referred to the TCEQ for selection and performance of the remedy under the VCP.



The Honorable Richard E. Greene Regional Administrator, Region 6 U.S. Environmental Protection Agency July 1, 2005 Page 5

With best regards, I am

Very truly yours,

F. William Mahley

FWM/ksb

cc: All via Federal Express and Email

J. William Mahley / vs

The Honorable Rick Perry Office of the Governor P. O. Box 12428 Austin, Texas 78711-2428

Zak Covar Natural Resource Advisor Office of the Governor P.O. Box 12428 Austin, Texas 78711-2428

Kathleen Harnett White Chairman Texas Commission on Environmental Quality Mail Code 100 P.O. Box 13087 Austin, Texas 78711-3087

Glenn Shankle
Executive Director
Texas Commission on Environmental Quality
Mail Code 109
P.O. Box 13087
Austin, Texas 78711-3087



Daniel Eden
Deputy Director
Office of Permitting, Remediation and Registration
Mail Code 122
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Jackie Hardee, P.E.
Director, Remediation Division
Office of Permitting, Remediation and Registration
Mail Code 225
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Caroline Sweeney, Senior Attorney Remediation and Financial Litigation Division Office of Legal Services Texas Commission on Environmental Quality Mail Code 175 P.O. Box 13087 Austin, Texas 78711-3087



OFFICE OF THE GOVERNOR

RICK PERRY GOVERNOR

March 1, 2005

The Honorable Richard E. Greene Regional Administrator, Region 6 U.S. Environmental Protection Agency 1445 Ross Avenue, Suite 1200 Dallas, Texas 75202-2733

RE: Gulfco Marine Maintenance Site in Freeport, Brazoria County, Texas

Dear Mayor Greene:

In December 2001, I referred the Gulfco Marine Maintenance Site in Freeport, Texas, to EPA for listing on the National Priorities List ("NPL"). It has come to my attention that, due to unusual circumstances, the present owner of this site was not afforded adequate notice of the imminent NPL listing nor was the present owner afforded a sufficient opportunity to address the site through the Texas Commission on Environmental Quality's (TCEQ") Voluntary Cleanup Program ("VCP").

This property has significant potential for redevelopment, and the interested parties are committed to cleaning up the site immediately. Remediation through the VCP will allow faster cleanup by parties and, importantly, will afford liability protection to a future buyer when a VCP certificate of completion is obtained. The environmental, economic, and social benefits to the local area all weigh in favor of this approach.

In light of these circumstances, I respectfully request your concurrence to allow this site to be addressed pursuant to TCEQ's VCP. I am convinced this is the best course of action for this site, and TCEQ is amenable to this proposal. I further request that Region 6 work cooperatively with TCEQ to facilitate the site's entry into the VCP and subsequent referral to EPA for delisting from the NPL once the site's remediation is completed and no further action is required.

Sincerely,

Governor

RP:zcp

cc: Ms. Kathleen Hartnett White, Chairwoman, Texas Commission on Environmental Quality Mr. Glenn Shankle, Executive Director, Texas Commission on Environmental Quality

POST OFFICE BOX 12428 AUSTIN, TIDUS 78711 (512) 463-2000 (VOICE)/DIAL 7-1-1 FOR RELAY SERVICES

VISIT WWW.TDUSCOMENE.COM THE OFFICIALWES SITE OF THE STATE OF TRUS



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 6 1445 ROSS AVENUE, SUITE 1200 DALLAS, TX 75202-2793

MAR 11 2005

James C. Morriss III
Thompson & Knight LLP
1900 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701-4081

RE: Gulfco Marine Maintenance Superfund Site in Freeport Texas

Dear Mr. Morriss:

Thank you for your letter of March 4, 2005, concerning the Gulfco Marine Maintenance Superfund Site (Gulfco Site). The Environmental Protection Agency (EPA) appreciates your efforts to work towards our mutual goal of quickly cleaning up the Gulfco Site in order to delete the site from the National Priorities List (NPL).

As you know, EPA, as well as your group consisting of Dow, Sequa, and LDL Coastal (hereinafter referred to as "Potentially Responsible Parties [PRP] Group"), has been exploring ways in which to meet the goal of quick cleanup of the Gulfco Site in order to delete it from the NPL. EPA initially proposed that the Gulfco Site be investigated in a Remedial Investigation and Feasibility Study (RI/FS) and be cleaned up under a Remedial Action. As a PRP Group that takes your obligations seriously, you committed to do the RI/FS in an Administrative Order on Consent (AOC). EPA and the PRP Group worked diligently for seven months to reach an AOC to conduct the RI/FS portion of the cleanup.

As the negotiations were wrapping up, the PRP Group, in a February 23, 2005, letter proposed exploring a two-year cleanup of the Gulfco Site under the Texas Voluntary Cleanup Program (Texas VCP) in order to meet our mutual goal of quick cleanup. EPA fully supports the Texas VCP and believes that this program is an excellent approach under appropriate circumstances. EPA's Memorandum of Understanding (MOU) with the Texas Commission on Environmental Quality on the Texas VCP was negotiated under the premise of not using the Texas VCP for NPL Sites. An assessment of the appropriate nature of the VCP for use at NPL Sites has not been completed. This assessment is currently being considered as a result of Governor Perry's request. However, it will take a considerable amount of time to carefully evaluate and the possibility of adopting a new policy regarding NPL Sites and the Texas VCP.

internet Address (URL) • http://www.eps.gov Recyclad/Recyclable • Printed with Vegetable Oil Buded Inits on Recycled Paper (Minimum 25% Postconsumer) Assessing the appropriate nature of the Texas VCP for use at NPL sites is a lengthy process. This, combined with your proposal's lack of detail about how a cleanup under the VCP would provide information sufficient to delete the Gulfco Site from the NPL, caused EPA to notify you in a February 28, 2005 letter via e-mail that EPA was willing to explore cleanup under appropriate State laws, but through an AOC with EPA so that the requirements for deletion from the NPL are met. In order to begin exploring this idea, EPA invited you to commit to an AOC process which would outline the investigation and cleanup of the Gulfco Site in a manner which will allow EPA to delete the Gulfco Site from the NPL.

The EPA was disappointed to learn in your March 4, 2005, letter, that you are declining to explore the AOC option to do cleanup of the Gulfco Site under federal and appropriate state law. An AOC between EPA and the PRPs assures that adequate information is collected to facilitate deletion as well as that appropriate response actions are completed. EPA is flexible as to the content of an order and scope of work assuming the cleanup is completed under federal and appropriate State law.

The EPA met with the PRP Group on March 7, 2005 in the Regional Office to discuss resolution of the impasse on the mechanism to most quickly clean up the Gulfco Site. At the meeting, the Regional Administrator reiterated some of the timing problems regarding the Texas VCP approach. EPA was pleased that the PRP Group understood the inability of meeting our mutual goal of timely cleanup under the Texas VCP process and agreed orally to exploring the AOC option with EPA in order to clean up the Gulfco Site. EPA requested that the PRP Group provide an outline of an investigation and cleanup that would take into account EPA's oversight role, public participation, assurance that all appropriate response actions are completed, and that is consistent with other NPL actions. EPA would like to see this issue resolved as soon as possible. Additional discussions to resolve this matter should be completed on an expedited basis.

In order to meet our mutual goal of quickly cleaning up the Gulfco Site in order to delete the site from NPL, the PRP Group can still sign the RI/FS AOC allowing for completion of the investigation in less than six months and the entire cleanup in eighteen months. This is quicker than amending the VCP program or drafting a new AOC for cleanup that incorporate appropriate State law. That being said, EPA is open to looking at alternative methods that will clean up the Gulfco Site faster than the options that EPA and the PRP Group have explored.

The EPA is looking to resolve cleanup of the Gulfco Site quickly. EPA eagerly awaits your alternative proposal in order to quickly wrap up discussions and begin cleaning up the Gulfco Site. Given the amount of time EPA has discussed with you the cleanup of the Gulfco Site, EPA believes it is reasonable to expect your proposal in the next couple of weeks so that we can discuss this matter in early April. Should you have any questions, don't hesitate to contact me.

Sincerely yours,

Samuel Coleman, P.E.

Director

Superfund Division

cc: Bill Mailey
Alan Daniels



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 8 1445 ROSS AVENUE, SUITE 1200 DALLAS, TX 75202-2733

March 24, 2005

James C. Morriss III
Thompson & Knight LLP
1900 San Jacinto Center
98 San Jacinto Boulevard
Austin, TX 78701-4081

RE: Gulfco Marine Maintenance Superfund Site in Freeport Texas

Dear Mr. Morriss:

Thank you for your letters of March 9 and 16, 2005, concerning the Gulfco Marine Maintenance Superfund Site (Gulfco Site). The Environmental Protection Agency (EPA) appreciates your written proposal outlining entering into an Administrative Order on Consent (AOC) with EPA to investigate and clean up the Gulfco Site. We look forward to working with you to assure that the Gulfco Site can be successfully remediated in a manner which protects human health and the environment and provides a basis for EPA to delist the site from the National Priorities List (NPL) upon completion of the response action.

In order to move forward in discussions regarding the proposed AOC for the Gulfco Site, we need additional information which will provide a more complete explanation of your proposal and the steps you are willing to perform to meet the needs EPA has identified. At the March 7, 2005, meeting, the Regional Administrator identified a number of requirements which must be addressed in any response action in order for EPA to assure that its responsibilities have been met and to allow delisting of the Gulfco Site from the NPL. In particular, he emphasized that any AOC must provide for the following:

- EPA oversight of the investigation and clean up;
- appropriate public participation;
- a mechanism to assure that all appropriate response actions are completed; and
- assurance that the response is consistent with other NPL actions.

Further, the Regional Administrator explained his concerns, and ours, that the Texas Voluntary Cleanup Program (Texas VCP) process, although useful in many cases, will not provide all of the assurances that EPA needs for the Gulfco Site.

Our understanding from the meeting was that your group consisting of Dow, Sequa, and LDL Coastal (hereinafter referred to as "Potentially Responsible Parties [PRP] Group") agreed to explore entering into an AOC consisting of an investigation and cleanup under appropriate state law, but addressing the federal requirements identified by the Regional Administrator.

Internet Address (URL) = http://www.eps.gov
Recycled/Hocyclable - Printed with Vegetable Oil Based infor on Recycled Paper (Minimum 25% Postconsumer)

2

We are committed to working with you to try to resolve remediation of the Gulfco Site quickly. In order to address these issues in the most efficient manner, we propose that a meeting be scheduled to discuss your proposal and the details of how you intend to address the requirements identified by the Regional Administrator. I have asked Barbara Nann, the Gulfco Site attorney, to contact you to schedule a meeting at the earliest point which our mutual schedules allow. If you have additional questions, she may be reached at 214-665-2157.

Sincerely yours,

Charles J. Sheehan Regional Counsel (6RC)

Samuel J. Coleman, Director Superfund Division (6SF)

cc: Bill Mailey
Alan Daniels
Lawrence E. Starfield

